

# So Why Don't We Just Call the Whole Rule of Law Thing Off, Then?

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On 22 October 2019, the European Commission published the [latest reports](#) on Bulgaria and Romania under the Cooperation and Verification Mechanism (CVM). Under this mechanism, the Commission is supposed to monitor and verify these countries' progress in the areas of rule of law and the fight against corruption because they did not entirely fulfill the accession criteria when joining the European Union (EU) in 2007. To the dismay of those following the agonizing death of Bulgaria's rule of law, the Commission [announced](#) it 'consider[ed] that the progress made by Bulgaria under the CVM [was] sufficient to meet Bulgaria's commitments made at the time of its accession to the EU' and it planned to take into account the observations of the European Parliament and Council before taking a final decision on the termination of Bulgaria's CVM. In stark contrast, Romania's CVM report was full of criticism.

Civil society seems outraged. Joeri Buhner Tavanier, former Permanent European Commission Representative on the CVM, [referred to](#) the Commission's decision on Bulgaria as 'a slap in the face of the rule of law'. The decision [deemed](#) Hristo Hristev, Professor of EU Law 'a farewell gift [by Juncker's Commission] rather than an objective evaluation'. Hristo Ivanov, former Minister of Justice, [argues](#) we have witnessed the result of 'political promises enforced in an unprincipled way'.

Civil society is aware of the dual standards *vis-à-vis* the rule of law, which emerge when one compares the Commission's reaction to troublesome developments in Bulgaria to its policies on Poland, Hungary, and Romania. The latest CVM report on Bulgaria not only confirms this, but also leaves the impression that the Commission has given up on Bulgaria's rule of law.

## You Say Tomato, I Say Tomahto: What Is the Rule of Law?

It seems that the song '[Let's Call the Whole Thing Off](#)' beautifully sung by Ella Fitzgerald and Louis Armstrong illustrates what critics believed to be wrong with Bulgaria's CVM for a long time. The song is known for its alternation of verses, which contain regional dialects, such as 'You like tomato and I like tomahto', which, in turn, indicate class differences and deeper societal divisions. Critics used to believe that the European Commission's overly diplomatic tone in Bulgaria's CVM reports was just an example of Brussels-speak. While Bulgarian civil society members and the Commission spoke differently, there was hope that fundamentally they talked about the same things and shared the same EU values.

Doubts about the Commission's dual standards and complicity with Bulgaria's regime started to rise when Juncker's Commission took over the CVM. This is when the Commission became lenient on longstanding problems of Bulgaria's justice system, such as the omnipotent Prosecutor's Office in which there are no checks and balances, started identifying progress when there was none (e.g. praising the General Prosecutor for self-increasing his already excessive powers), and ignoring blatant abuses of judges and overt corruption in Boyko Borissov's governments. The tipping point for critics was Bulgaria's [2018 CVM report](#), which declared three of the six benchmarks the Commission allegedly monitors closed – judicial independence, legal framework, and organized crime.

Civil society members and reputable organizations, such as *Magistrats Européens pour la Démocratie et les Libertés* (MEDEL), [raised concerns](#) that the conclusions of the 2018 report did not match reality. Bulgarian judges, including the President of the Supreme Court of Cassation Lozan Panov, [had been outspoken about harassment](#) they were subjected to because they refused to comply with political orders. The Supreme Judicial Council, which elects and promotes all magistrates and monitors their ethical values, had repeatedly proven it was [a mouthpiece for the government](#), which was incapable of defending judicial independence. In 2017, Bulgaria implemented a major crackdown on human rights by reforming the Code of Criminal Procedure – a move, which the Commission characterized as progress.

In addition, by 2018, the country had been torn by a series of scandals evidencing the rampant corruption of Bulgaria's Prosecutor's Office and Borissov's government – [Yaneva Gate](#) (leaked recordings of conversations between two judges who discuss how Borissov and the General Prosecutor Tsatsarov tell them how to decide cases), [Tzum Gate](#) (a meeting between the General Prosecutor Tsatsarov and a businessman in which Tsatsarov warned the man to be careful about his political views), public statements by investigator Boyko Atanasov who [argued](#) there was a special unit at the Prosecutor's Office whose role was to initiate bogus criminal proceedings against government opponents, etc.

## On Ruining Tomatoes and the Rule of Law

One can safely say that to be successful at growing tomatoes, one should guard them from disease. A key part of the process of diagnosis is comparing your plant to other healthy plants and identifying differences. I have also been told that insects on the leaves are serious threats that should be handled straight away. This is exactly what the Commission did not do. As a result, Bulgaria's government decided it had a license to complete the capture of Bulgaria's justice system.

The year following the 2018 CVM report has been marked by an [escalation](#) of harassment against inconvenient judges, further [questionable law reforms](#) aimed at limiting fundamental rights, [attempts to misuse CVM recommendations](#) to create new tools for the harassment of judges, [corruption scandals](#) in the anti-corruption agency, etc. The Supreme Judicial Council does not shy away from demonstrating its political dependencies either. Under murky circumstances, it nominated only one person (Ivan Geshev) as General Prosecutor of Bulgaria. [Reputable NGOs](#) and

established [civil society members](#) believe this nomination is inadmissible due to his track record of human rights violations and his services to the corrupt status quo. They also argue the nomination procedure is flawed and turns the country into a prosecutorial monarchy for Geshev who is a protégé of the current controversial General Prosecutor Tsatsarov, as evidenced by the history of his career promotions. Bulgaria is currently shaken by mass protests against Geshev's nomination and the Supreme Judicial Council itself. MEDEL [have criticized](#) the Council for failing to defend judicial independence.

These developments do not seem to have troubled the Commission, which took the government's narrative and promises at face value. In the 2019 CVM report, the Commission reaffirmed that the benchmarks judicial independence, legal framework, and organized crime had been closed because of satisfactory progress. While it recognized that some work remained regarding the other three benchmarks (continued reform, general corruption, and high-level corruption), the Commission was satisfied with the government's 'commitments'. It declared progress in these areas was to be monitored by a post-monitoring council set up by the government in September 2019 and chaired by the Vice-Minister of Justice and the Representative of the Supreme Judicial Council. It is unclear how another political council at the hands of the government can contribute to the protection of the fragile rule of law in Bulgaria, which has been assaulted by the government itself. One may reasonably expect that this council, similarly to other recently set up institutions such as the anti-corruption agency, will be used to portray the government in the most flattering light in denial of reality.

## **A Promise is a Promise, a Rotten (Rule of Law) Tomato is Cheap**

One can better appreciate the grand scale of Bulgaria's CVM drama from a political perspective – namely, the destructive role of the European People's Party (EPP), which has embraced Borissov's regime. As early as 2016, Juncker [told media](#) 'he had always said ... that Bulgaria would exit the [CVM] during the mandate of [his] Commission'. But how did he know, at the time or before that, that Bulgaria would fulfill all CVM recommendations by 2019? Since then, Juncker competed with other EPP prominent members in complimenting Borissov's regime for its alleged achievements, which remained invisible to Bulgarians. For instance, Joseph Daul [called](#) Borissov 'the best *chef d'Etat* in Europe'. During the Bulgarian Presidency of the Council of the EU in 2018 Juncker even [called upon](#) Borissov 'to participate in the rule of law endeavor in Poland'.

Juncker's non-EPP Commissioners also progressively became complicit with the idea of turning a blind eye to the death of Bulgaria's rule of law. Following the 2018 CVM report, the Commissioner for the Rule of Law Frans Timmermans [welcomed](#) 'steady progress' in Bulgaria and affirmed the CVM would be lifted if 'the positive trend continued'. In the summer of 2019, when negotiating for Borissov's support for Commission President, Timmermans [was filmed](#) saying that 'his friendship' with

Borissov was based on his admiration for his fight against corruption and organized crime – a statement he would surely regret in the long run.

Following Bulgaria's deplorable ranking in the EU Justice Score Board announced in April 2019, the Commissioner for Justice Věra Jourová [expressed an opinion](#) that the CVM should not be lifted. Borissov replied that both Timmermans and Juncker had made promises to him. As Jourová refrained from further EPP-unorthodox statements on the matter, it was clear Bulgaria's rule of law was sold at a very cheap price just like a rotten tomato.

## The Politics of Calling the Rule of Law 'Thing' Off

In 'Let's Call the Whole Thing Off', the lyrical subjects discuss ending their relationship because it does not work due to their differences. Rule of law experts have been aware that the CVM was compromised for many reasons – no reward/punishment for compliance/non-compliance, faulty methodology of evaluating progress, lack of transparency, behind-the-curtain political deals, the Commission's shortage of capacity to properly identify challenges, etc. While it was obvious this mechanism had to end, its failure and the terms of its termination should be a source of concern for the EU because the end of a mechanism cannot be an excuse to call off the rule of law in general:

1. For years, when prompted to compare the democratic decay in Hungary and Poland to the developments in Bulgaria, the Commission has comforted the general public that everything is in control because of the CVM. This is a key difference between the rule of law crises in these countries and the rule of law decline in Bulgaria: Bulgaria's government assaulted the rule of law with the knowledge and even assistance of the Juncker Commission, which acted as a publicist for Borissov's regime.
2. The Commission's subservience to Borissov's regime feeds Euroscepticism and discredits it as an institution. The Commission is trying to make Bulgarians believe that there is a fight against corruption when we are governed by corruption.
3. The Commission's [claim](#) that the post-monitoring council set up by Bulgaria's government in September 2019 will ensure continued reform and thus justifies CVM's termination is an oxymoron. A government which assaults the rule of law cannot be trusted to enforce the rule of law.
4. The only way to explain the diverging outcomes of Bulgaria's and Romania's CVM is dual standards fueled by the EPP. Bulgaria's CVM experience shows that political calculations trump the rule of law.
5. Those who believe that the new rule of law mechanism tying the rule of law to EU funds, which will be applicable to all Member States, will be helpful in solving Bulgaria's problems, or the rule of law challenges of any Member State, may be disappointed. The next Commission is also dominated by the EPP and the actors responsible for the rule of law are generally the same. Expecting objective monitoring, at this stage, seems unwise.

In conclusion, while some of us have been focused on the problems of individual Member States, we have missed the big picture – the Commission has been rotting away at an unimaginable rate. But are the European Parliament and Council capable of helping it get back on track? Their response to the Commission's dealings with Bulgaria's CVM will be a litmus test for the state of the rule of law in the EU. You recognize a good tomato once you taste it.

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